No. 26.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

FRANCISCA L. DE MARTIN, *Appellant,*

v.

JAMES PHELAN, *Appellee.*

APPELLANT'S BRIEF.

GEORGE D. COLLINS,
Counsel for Appellant.

Filed April ..... *1892.*

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..... *Clerk.*

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APPELLANT'S BRIEF.

I.

This is a suit in equity to redeem certain realty from mortgages held by defendant; the defendant interposed a demurrer to the Bill, and the Circuit Court sustained it upon the ground of want of equity. The plaintiff declining to amend, judgment and decree followed in favor of defendant dismissing the Bill. (Transcript, pages 1, 13, 16, 18) From that decree this appeal is taken, and the error assigned is: that

the Circuit Court erred in sustaining the demurrer, and, of course, that therefore its decree is erroneous, and ought to be reversed with instructions to overrule the demurrer. (Transcript, page 19.)

II.

The Bill clearly presents the following facts, viz :

1. The relation of mortgagor and mortgagee.

McMillan *v.* Richards, 9 Cal., 406, 412 ;
Goldtree *v.* McAllister, 86 Cal., 105 ;
Evansville *v.* Indiana, 20 Am. Law Reg. N. S., 676.

2. That the mortgagee purchased the equity of redemption for the sum of $19,000, whereas he knew at the time that its actual market value was the sum of $45,500.

Biddle *v.* Brizzolera, 64 Cal., 358–362.

3. That at the time of said purchase the plaintiff, the owner of the equity of redemption, was in indigent circumstances—in great need, with no available means of support all of which defendant well knew, and that he took advantage of plaintiff's necessitous condition and used his position as mortgagee to secure, and did secure, the equity of redemption at a gross under-valuation, and for a grossly inadequate consideration.

Upon the foregoing facts, the appellant maintains that she is entitled to the relief demanded in her Bill, and that her position in this respect is correct is made manifest by the following authorities, viz :

Peugh *v.* Davis, 96 U. S., 337, per Field, J.
Villa *v.* Roderiguez, 12 Wall., 339.
Russell *v.* Southard, 12 How., 154.
Dougherty *v.* Mc Colgan, 6 Gill & J., 275.
Baugher *v.* Merryman, 32 Md., 191, *et seq.*
Perkins vs. Drye, 3 Dana, 177, *et seq.*
Barnes *v.* Brown, 71 N. C., 509.
Lynell *v.* Lyford, 72 Me., 280.
Patterson *v.* Yeaton, 47 Me., 306.
Schekel *v.* Hopkins, 2 Md. Ch., 90.
Green *v.* Butler, 26 Cal, 601–603, to be read with
Odell *v.* Montross, 68 N. Y., 504.
Goodman *v.* Pledger, 14 Ala., 118.
Ford *v.* Olden L. R., 3 Eq. Cas., 461, per Stuart, V. C.
Holdridge *v.* Gillespie, 2 Johns. Ch., 30.
2 Jones on Mortgages, § 1046.

Of course, we do not claim that mere inadequacy of consideration will avoid a conveyance or other contract, but we do say that the relation of mortgagor and mortgagee existing, conjoined with the fact that the mortgagor is deprived of free agency by reason of poverty, and consequent pressing need, that a sale of

the equity of redemption to the mortgagee who has full knowledge of all the facts, for less than one-half of its value, establishes a *prima facie* case of an involuntary transfer of the equity of redemption, and shows that the mortgagee took advantage of the necessities of his debtor, in procuring the transfer, and more especially where it is expressly averred, as here, that the mortgagee availed himself of his position and of the pressing needs of his poverty-stricken debtor, and actively procured the conveyance of the equity of redemption for less than half its value.

To constitute a *prima facie* case, it is sufficient for the appellant to show the relation of mortgagor and mortgagee, combined with gross inadequacy of consideration ; and the transfer of the equity of redemption will be held invalid unless the mortgagee, assuming the burden of proof thus cast upon him, satisfies the Court that the transfer was as voluntary as though the parties stood upon an equal footing, and dealt at "arm's length."

This position is fully sustained by the authorities cited ; it does not proceed on the theory of actual fraud, or that of a trust relation, but rather upon the necessity of a free, voluntary and independent consent on the part of the mortgagor.

Its policy is to avoid the undue influence likely to arise from the financial coercion attending the relation of mortgagor and mortgagee, and to preserve the free agency of the mortgagor ; it is nothing more than the

ancient doctrine of the Court of Chancery, the doctrine of the protection of the weak and helpless against the aggressiveness and rapacity of the strong and powerful.

3 Pomeroy's Equity Jur., § 1,193, note 1.
McKinstry *v.* Conly, 12 Ala., 683.
Vernon *v.* Bethell, 2 Eden, 113.
Tooms *v.* Conset, 1 Atk., 261.
Sheckel *v.* Hopkins, *supra.*
Perkins *v.* Drye, *supra.*
Villa *v.* Roderiguez, *supra.*
Dougherty *v.* McColgan, *supra.*
2 Pomeroy's Equity Jur., § 951.

Nor does the fact that in some of the cases cited the mortgage transferred the legal title to the mortgagee, make any difference in the application of the principle. It has always been the established doctrine of equity that a mortgage merely created a lien, and nothing more, and it has been side by side that the principle we invoke and the equitable doctrine pertaining to the nature of a mortgage, have grown and become firmly established in the system of equity jurisprudence.

3 Pomeroy's Equity Jur., § 1,204.
Odell *v.* Montross, 68 N. Y., 503.
Vernon *v.* Bethell, *supra.*
Toomes *v.* Conset, *supra.*

On the point of laches, the following authorities show it to be utterly devoid of merit:

Hall *v.* Arnot, 80 Cal., 355, 356.
2 Pomeroy's Eq. Jur., § 1,053.
1 Perry on Trusts, § 166.
Michoud *v.* Girod, 4 How., 561.
Manning *v.* Hayden, 5 Sawy., 380.
Hall *v.* Russell, 3 Sawy., 515, 516.
Varick *v.* Edwards, 1 Hoff. Ch., 383.
Wood on Limitations, § § 59, 60.

We respectfully submit that the judgment is erroneous, and should be reversed with instructions to the lower Court to overrule the demurrer.

Respectfully submitted,

GEORGE D. COLLINS,

Attorney for Appellant.